IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA-09-0322

PLAINS GRAINS LIMITED PARTNERSHIP, a Montana limited partnership; PLAINS GRAINS, INC., a Montana corporation; ROBERT E. LASSILA and EARLYNE A. LASSILA; KEVIN D. LASSILA and STEFFANI J. LASSILA; KERRY ANN (LASSILA) FRASER; DARYL E. LASSILA and LINDA K. LASSILA; DOROTHY LASSILA; DAN LASSILA; NANCY LASSILA BIRTWISLE; CHRISTOPHER LASSILA; JOSEPH W. KANTOLA and MYRNA R. KANTOLA; KENT HOLTZ; HOLTZ FARMS, INC., a Montana corporation; MEADOWLARK FARMS, a Montana partnership; JON C. KANTOROWICZ and CHARLOTTE KANTOROWICZ; JAMES FELDMAN and COURTNEY FELDMAN; DAVID P. ROEHM and CLAIRE M. ROEHM; DENNIS N. WARD and LaLONNIE WARD; JANNY KINION-MAY; C LAZY J RANCH; CHARLES BUMGARNER and KARLA BUMGARNER; CARL W. MEHMKE and MARTHA MEHMKE; WALTER MEHMKE and ROBIN MEHMKE; LOUISANA LAND & LIVESTOCK, LLC, a limited liability corporation; GWIN FAMILY TRUST, U/A DATED SEPTEMBER 20, 1991; FORDER LAND & CATTLE CO.; WAYNE W. FORDER and DOROTHY FORDER; CONN FORDER and JEANINE FORDER; ROBERT E. VIHINEN and PENNIE VIHINEN; VIOLET VIHINEN; ROBERT E. VIHINEN, TRUSTEE OF ELMER VIHINEN TRUST; JAYBE D. FLOYD and MICHAEL E. LUCKETT, TRUSTEES OF THE JAYBE D. FLOYD LIVING TRUST; ROBERT M. COLEMAN and HELEN A. COLEMAN; GARY OWEN and KAY OWEN; RICHARD W. DOHRMAN and ADELE B. DOHRMAN; CHARLES CHRISTENSEN and YULIYA CHRISTENSEN; WALKER S. SMITH, JR. and TAMMIE LYNNE SMITH; JEROME R. THILL; AND MONTANA ENVIRONMENTAL INFORMATION CENTER, a Montana nonprofit public benefit corporation,

Plaintiffs and Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF CASCADE COUNTY, the governing body of the County of Cascade, acting by and through Peggy S. Beltrone, Lance Olson and Joe Briggs,

Defendants and Appellees,

and

SOUTHERN MONTANA ELECTRIC GENERATION and TRANSMISSION COOPERATIVE, INC.; the ESTATE OF DUANE L. URQUHART; MARY URQUHART; SCOTT URQUHART; and LINDA URQUHART,

Intervenors and Appellees.

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# APPELLEE BOARD OF COUNTY COMMISSIONERS' BRIEF

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On Appeal from the Montana Eighth Judicial District Court
Cascade County, Montana
Cause No. BDV-08-480
Hon. E. Wayne Phillips

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## I. STATEMENT OF THE ISSUE

Did the District Court correctly conclude as a matter of law that the Commissioners and Southern Montana Electric Generation and Transmission Cooperative, Inc. ("SME") are entitled to summary judgment where the Commissioners properly complied with statutory requirements for a rezoning request, provided the public with a meaningful opportunity to participate and reached a decision that is supported by the record of the proceedings?

## II. STATEMENT OF THE CASE

On March 11, 2008, the Cascade County Commissioners granted final approval to a request by Duane, Mary, Scott and Linda Urquhart (the "Urquharts") to rezone their land from A-2 Agricultural to I-2 Heavy Industrial. The expressed purpose of the rezoning request as expressly limited (or "conditioned") by the approval was to allow the construction and operation of the Highwood Generating Station, a 215-250 mW electrical generating facility owned by SME. SME is a collection of electrical distribution companies that provide electricity to approximately 50,000 Montanans.

Plaintiffs (collectively "Plains Grains"), largely comprised of landowners located within a few miles of the land included in the rezoning request and the Montana Environmental Information Center, filed this action on April 11, 2008,

challenging the rezoning approval on a variety of claims including spot zoning and improper public participation. These claims were filed under a request for a Writ of Mandate, a Writ of Review and Declaratory relief.

SME and the Urquharts intervened by an unopposed motion granted on May 2, 2008. Cascade County filed the record of the rezoning proceedings with the district court on May 28, 2008. The parties then filed a variety of motions. SME filed a Motion to Dismiss or in the Alternative Summary Judgment which the district court later converted to a motion for summary judgment. Plains Grains followed with a Motion for Summary Judgment on September 26, 2008. The district court held a hearing on SME's Motion for Summary Judgment on October 2, 2008.

On October 16, 2008, Plains Grains filed a Notice of Compliance and Request for Immediate Issuance of Peremptory Writ of Mandate and/or Writ of Review alleging it had fully satisfied the procedural requirements and asking the court to immediately issue a writ. The parties stipulated to a shortened briefing schedule and the court set a hearing for November 3, 2008. On October 29, 2008, the court issued an order setting an emergency hearing for October 31, 2008, replacing the hearing set for November 3. Following the hearing, SME filed a motion to strike the various affidavits attached to Plains Grains' Motion for

Summary Judgment because they included information outside the record of the proceedings, improper legal argument and a lack of personal knowledge.

On November 20, 2008, the court issued a request to the parties asking if they were willing to stipulate to the following, or be prepared to schedule an emergency factual hearing: "1. Can the Court find that the Planning Board Staff Report was on file with the Clerk & Recorder; and 2. Can the Court find that the County Commissioner's Agenda Action Report was on file with the Clerk & Recorder." Ex. A. Plains Grains declined to stipulate to these facts and the court held an emergency evidentiary hearing on November 26, 2008. At the emergency hearing, the County provided undisputed testimony from the Planning Director and Deputy Clerk and Recorder that the Planning Board Staff Report and County Commissioner's Agenda Action Report were on file with the Clerk and Recorder's Office during the rezoning application process. Plains Grains offered no witnesses who had even sought such documents from the Clerk and Recorder's Office during the rezoning application process, much less witnesses who could dispute the County's testimony.

At SME's and Plains Grains' request, the court expedited its consideration of the matter and issued its Order on Motions for Summary Judgment and Writ of Mandamus/Writ of Review on November 28, 2008. The court granted summary

judgment on the Urquharts' Motion for Summary Judgment based on mootness and denied SME's motion. The court denied Plains Grains' Motion for Summary Judgment as well as its request for a Writ of Mandate or Writ of Review.

After the parties disagreed whether the district court's Order was a final judgment for purposes of appeal, Plains Grains filed a Writ of Supervisory Control with this Court. This Court agreed to exercise supervisory control to a limited degree, ordering the district court to resolve any remaining claims in Plains Grains' complaint and issue a final judgment. Appellants' Br., Tab A at 4-5 (Aug. 14, 2009). The Court noted that following the district court's resolution of any remaining claims, Plains Grains could choose to appeal the final judgment or seek a stay or injunction pending appeal. Appellants' Br., Tab A at 4-5. The parties then agreed the district court should enter summary judgment in Defendants' favor while denying all of Plains Grains' claims on the basis of the rationale set forth in the district court's Order dated November 28, 2008. The district court issued its order and judgment based on the parties' stipulation on May 29, 2009. Plains Grains timely appealed and SME filed a cross-appeal.

As is noted in the various orders and briefs, Cascade County requires a "Location Conformance Permit" to be issued prior to construction of all buildings, structures, signs and foundations, with some exceptions. This permit is required by

Section 11.2 of the Cascade County Zoning Regulations ("CCZR") to ensure that the proposed development is consistent with the applicable zoning regulations before use of the completed structures may begin. While the underlying lawsuit was pending, SME filed an application for a local conformance permit to proceed with construction of the Highwood Generating Station. The Cascade County Zoning Administrator approved SME's location conformation permit on October 24, 2008, and construction began on the facility soon thereafter. On October 28, 2008, Plains Grains appealed the County's decision to issue the location conformance permit to the County's Zoning Board of Adjustment as permitted by Section 12.3 of the CCZR and Montana Code Annotated § 76-2-223 (2007). The Board of Adjustment held a hearing on December 12, 2008 and denied Plains Grains' appeal, finding the County Zoning Administrator had properly issued the location conformance permit in accordance with the conditions required by the County Commissioners as part of the rezoning approval. The Board issued a written decision on January 6, 2009.

Pursuant to Montana Code Annotated § 76-2-227 (2007), Plains Grains and any other interested party had thirty days from the date of the Board of Adjustment's decision to appeal the decision to district court. Neither Plains Grains nor any other party appealed the decision to district court. To date, Plains

Grains has never filed any request for an injunction to prevent the County from considering or issuing a location conformance permit, to prevent the sale of the land from the Urquharts to SME, or to prevent SME from constructing its facility.

## III. STATEMENT OF FACTS

On October 30, 2007, Duane and Mary Urquhart and Scott and Linda Urquhart filed their "Application for Rezoning to Cascade County." Not. Filing Rec. Proceedings at R. 010059 (May 28, 2008) ("Notice"). The CCZR required a letter of application from the landowners which was included in the application. Notice at R. 010060-010061. As required by the CCZR, the letter was submitted and signed by all of the four Urquharts who owned the land to be rezoned and was specifically "provided pursuant to, and in accordance with, Cascade County Zoning Regulation 14.1.1.1." Notice at R. 010060-010061.

The introduction to the application stated that the requested rezoning from Agricultural (A-2) zoning to Heavy Industrial (I-2) zoning was a prerequisite to the planned construction and operation of an electric generating station, known as the Highwood Generating Station. Notice at R. 010062. The application's introduction section also stated that the applicants intended to sell the rezoned property to SME, which planned to "permit, construct and operate HGS, a 215-250 mW electrical generating facility." Notice at R. 010062.

The application consisted of thirty-seven pages of text and thirty-three exhibits, and addressed the proposed use of the property for the Highwood Generating Station. Notice at R. 010059-010277. It did not address any other proposed use of the property which might be allowed under the County's I-2 Heavy Industrial Zoning because no other uses of the property were intended or contemplated. The application addressed the twelve criteria set forth in Montana Code Annotated § 76-2-203 and the CCZR which must form the basis of a local government's decision to zone or rezone property. Notice at R. 010074-010093.

The application discussed and included the Record of Decision and Executive Summary to the Federal Environmental Impact Statement prepared for the HGS. Notice at R. 010297-010363. The Environmental Impact Statement addressed a wide range of socioeconomic and environmental issues, evaluated alternative sites for the Highwood Generating Station and concluded that the area proposed for the rezoning was the preferred site compared to other sites located in Cascade County and beyond. Notice at R. 010362.

The County Planning Staff understood the application limited the proposed use of the rezoned property to the Highwood Generating Station and not other land uses which might be permitted by the I-2 zoning district. Notice at R. 010453 (noting that the proposed rezoning would be in compliance with the Cascade

County Growth Policy if limited to the Highwood Generating Station and not other industrial uses). The application set forth the grounds for the proposed rezoning in accordance with the requirements of Section 14.1.1.1 of the CCZR.

County Planning Staff placed the completed application on file at the Cascade County Clerk and Recorder's Office and on the County Planning Department's website beginning November 1, 2007. The Cascade County Planning Department evaluated the application in accordance with the requirements of the CCZR and state statutes and issued a Staff Report to the Cascade County Planning Board, dated November 19, 2007, which recommended approval of the rezoning request. Notice at R. 010442-010516. The eighteen-page report included four exhibits from the application and various other attachments, and was available for review by the public at the County Planning Office and on the County Planning Department's website.

Among the many issues addressed in the Staff Report, Planning Staff determined that a number of conditions needed to be considered in order to bring the application into compliance with the Cascade County Growth Policy and to address potential impacts including: the development of a traffic mitigation plan for Salem Road; paving Salem Road; mutual aid agreements; state building permits; compliance with all federal, state and local laws, rules and regulations;

landscaping design; and lighting design. Notice at R. 010454-010457.

The Staff Report directly addressed all twelve statutory criteria which form the basis of a decision to rezone property set forth in § 76-2-203, Chapter 1, Section 1 of the CCZR and *Lowe v. City of Missoula* (1974), 165 Mont 38, 46-47, 525 P.2d 551, 555, *overruled on other grounds, Greens at Fort Missoula v. City of Missoula* (1995), 271 Mont. 398, 897 P.2d 1078. Notice at R. 010447-010459.

The County Planning Department provided notice of the rezoning request via publication in the *Great Falls Tribune* of a hearing before the Cascade County Planning Board to consider the rezoning request. Notice at R. 010415-010416. The notice contained three descriptions of the boundaries of the area to be rezoned, County Assessor parcel numbers for each parcel, a township, section and range description, and a metes and bounds description taken from a certificate of survey showing the parcels involved in the rezoning. The township, section and range description in the notice published in the *Great Falls Tribune* inadvertently omitted a reference to "Section 24, W1/2." The other two descriptions fully and accurately described the boundaries of the area to be rezoned. As the parcels included within the area to be rezoned were all owned by the applicant, the area to be rezoned was known to all landowners subject to the change in zoning. Notice at R. 010415-010416. No member of the public who submitted comments in writing or orally at

any of the hearings complained about the description of the boundaries of the area to be rezoned or expressed any confusion regarding which parcels were or were not included in the rezoning request. The district court determined the County gave proper notice despite the inadvertent omission given two of the descriptions were complete and no person ever raised an issue with the description during the process. Plains Grains does not appeal the district court's decision on this issue.

On the evening before the public hearing at the Planning Board, County Planning Staff prepared a summary of all public comments received to date and read the summary into the record at the Planning Board Hearing. Notice at R. 020002-020008. *See* Notice at R. 110012-110282. The Cascade County Planning Board held a public hearing on December 4, 2007, beginning at 9:00 a.m. After permitting any person in attendance to speak, the Board deliberated and voted to recommend to the County Commissioners that the application for rezoning be approved. Notice at R. 100003-100004.

Following the Planning Board Hearing, the County published notice of a public hearing to be held before the County Commissioners to consider the rezoning request. Again, the notice contained three descriptions of the area included in the rezoning request. Two of the descriptions were complete and accurate while the township, section and range description inadvertently left out

"Section 24, W1/2." As the parcels included within the area to be rezoned were all owned by the applicant, the area to be rezoned was known to all landowners subject to the change in zoning.

As staff to the Planning Board, Planning Staff prepared an Agenda Action report, dated January 10, 2008, to the County Commissioners explaining the Planning Board's recommendation, setting forth the procedural history of the process to date and including a Staff Report which had been modified based on the discussion held at the Planning Board Hearing. Notice at R. 100001-100033. In a letter dated January 9, 2008, SME informed the County Commissioners that it would accept eleven conditions pertaining to the rezoning request and the location conformance permit that would be required by the County prior to construction of the Highwood Generating Station.

The Cascade County Commissioners held a public hearing on January 15, 2008, beginning at 3:00 p.m. and concluding at 2:30 a.m. Following extensive public comments, the Commissioners tabled the matter for further consideration. The Cascade County Commissioners reconvened on January 31, 2008, and voted to approve the passage of a Resolution of Intent to rezone the property. The Commissioners published notice of the Resolution of Intent to rezone the property in the *Great Falls Tribune* which triggered a thirty-day protest period pursuant to

Montana Code Annotated § 76-2-205. Following the expiration of the thirty-day protest period, and having received an insufficient number of protests to prevent the Commissioners from approving the rezoning, the Commissioners voted to give final approval to the rezoning request on March 11, 2008.

Plaintiffs challenged the Commissioners' decision by filing an action in district court on April 11, 2008. The procedural history is summarized in the Statement of the Case. Following the rezoning approval, SME purchased the property and proceeded with its plans for construction by filing an application for a location conformance permit with Cascade County. The Zoning Administrator approved the location conformance permit on October 24, 2008, allowing construction of the structures to begin. Plains Grains appealed the Zoning Administrator's decision to the Board of Adjustment, which held a hearing on December 12, 2008. The Board of Adjustment rejected Plains Grains' appeal, finding the Zoning Administrator's approval to be in accordance with the CCZR and the conditions adopted by the Commissioners for the rezoning. Plains Grains did not appeal this decision to the district court.

## IV. STANDARD OF REVIEW

This Court reviews summary judgment rulings de novo. *Country Highlands Homeowner's Assn., Inc. v. Bd. of Co. Commrs. of Flathead Co. ex rel. Hall*, 2008

MT 286, ¶ 14, 345 Mont. 379, 191 P.3d 424 (citing *Yurczyk v. Yellowstone Co.*, 2004 MT 3, ¶ 14, 319 Mont. 169, 83 P.3d 266). When reviewing a district court's grant of summary judgment, the Court applies the same evaluation as the district court based on Montana Rule of Civil Procedure 56. *Country Highlands*, ¶ 14. The district court reviews a motion for summary judgment under this frequently cited standard:

> The movant must demonstrate that no genuine issues of material fact exist. Once this has been accomplished, the burden then shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue [of fact] does exist. Having determined that genuine issues of fact do not exist, the court must then determine whether the moving party is entitled to judgment as a matter of law.

*Osterman v. Sears, Roebuck & Co.*, 2003 MT 327, ¶ 17, 318 Mont. 342, 80 P.3d 435 (quoting *Bruner v. Yellowstone Co.* (1995), 272 Mont. 261, 264, 900 P.2d 901, 903 (citations omitted)). Conclusions of law are reviewed to determine whether the district court's conclusions are correct. *Bitterrooters for Planning v. Bd. of Co. Commrs. of Ravalli Co.*, 2008 MT 249, ¶ 12, 344 Mont. 529, 189 P.3d 624 (citing *Yockey v. Kearns Props., LLC*, 2005 MT 27, ¶ 12, 326 Mont. 28, 106 P.3d 1185).

Montana has long recognized that adopting and revising zoning regulations are legislative acts. *North 93 Neighbors, Inc. v. Bd. of Co. Commrs. of Flathead Co.*, 2006 MT 132, ¶ 18, 332 Mont. 327, 137 P.3d 557 (citing *Schanz v. City of*

*Billings* (1979), 182 Mont. 328, 335, 597 P.2d 67, 71). As legislative acts, the Commissioners' decisions to amend the zoning regulations are entitled to the presumptions of validity and reasonableness. *Schanz*, 597 P.2d at 71. The proper standard of review of the Commissioners' decision to approve the rezoning is abuse of discretion. *Schanz*, 597 P.2d at 71 (quoting *Lowe*, 525 P.2d at 554) ("'While neither the trial court no[r] this court can substitute its discretion for that of the City Council, the judiciary does have the power to find whether or not there has been an abuse of discretion.'"). Plains Grains may prevail only if the Commissioners' decision was so lacking in fact and foundation as to make judicial review impossible. *See Schanz*, 597 P.2d at 71. The record of the decision clearly demonstrates this was not the case. Many of Plains Grains' arguments in its Complaint and Application for Writ of Review and Writ of Mandate amount to nothing more than a difference of opinion regarding the Commissioners' evaluation of subjective criteria. As to any item the Commissioners were required to evaluate, there was no one "right" answer. Rather, based on the record before them, the Commissioners appropriately reviewed the required criteria, conducted the required process and reached a conclusion that is supported by the record. Recognizing this, Plains Grains largely turns to technical arguments attacking the process rather than addressing the merits of the Commissioners' decision.

## V. SUMMARY OF ARGUMENT

Amending zoning regulations is a legislative act. The Commissioners' decision to approve or deny a rezoning request is entitled to significant deference. In this case, the Commissioners properly followed the procedures stated in the CCZR and state statutes and reached a decision that is supported by the record of the proceedings. The Commissioners accepted a complete application, provided proper public notice of the proposed rezoning request and provided multiple opportunities and methods for public participation. After thoroughly examining thousands of pages of written information and hours of public hearing testimony, the Commissioners approved the request with eleven conditions designed to bring the proposal into better compliance with the County's growth policy and protect the public health, safety and welfare. The Commissioners' choice to adopt conditions was consistent with prior legal precedent and a proper function of their powers inherent in the zoning enabling act.

The rezoning does not constitute spot zoning because the proposed use of the property is consistent with uses already allowed via a special use permit under the prior A-2 Agricultural zoning. Moreover, the proposed facility has unusually unique needs and characteristics, the area included in the rezoning is quite large, and the benefit of the rezoning extends well beyond a single landowner by

providing additional electricity to thousands of Montana citizens.

Finally, SME's letter dated January 8, 2008, accepting the conditions of the rezoning as stated in the Staff Report was not "proposed zoning regulations" for purposes of the Commissioners' statutory requirement to provide public notice upon beginning the process to consider the Urquharts' rezoning request. Nor did SME's presentation of additional written materials to the Commissioners at the public hearing violate Plains Grains' right of public participation where the Commissioners received the information at the same time as all other persons participating in the public review process.

## VI. ARGUMENT

Amending zoning regulations is a statutorily prescribed process requiring a series of actions by the local county planning board and county commission, culminating in a legislative decision by the county commissioners. The responsibility for preparing and revising zoning regulations is delegated to the planning board. Mont. Code Ann. § 76-2-204 (2007). The procedures for amending a zoning ordinance are specified in Montana Code Annotated § 76-2-205. Following a recommendation from the planning board, the commissioners must publish a notice of a hearing on the amendment. Mont. Code Ann. § 76-2-205(1) (2007). At the public hearing, the commissioners must "give the public an

opportunity to be heard." Mont. Code Ann. § 76-2-205(2) (2007). After the public hearing, the commissioners must review the recommendation from the planning board and make any revisions or amendment they deem proper. Mont. Code Ann. § 76-2-205(3) (2007). The commissioners must then pass a resolution of intent to adopt the amendment, publish notice of the resolution, and provide a thirty-day protest period. Mont. Code Ann. §§ 76-2-205(4)-(5) (2007). Unless 40% of the landowners within the zoning district protest the amendment during the protest period, the commissioners may pass a final resolution adopting it. Mont. Code Ann. § 76-2-205(6) (2007). The CCZR mirror these requirements. There is no question but that the Commissioners complied with each of these steps.

Plains Grains presented the district court with a long list of complaints which the court characterized as the proverbial "kitchen sink." Appellants' Br., Tab A at 12:10. This approach caused the district court to spend "very valuable time considering those that are substantive and those that may be fairly described as less so." Appellants' Br., Tab A at 12:11-12. On appeal, Plains Grains presents three primary issues, alleging the rezoning constitutes spot zoning, alleging the conditions attached to the rezoning were not permitted, and alleging violations of the public's right to participate in the proceedings. These allegations are refuted by the record of the proceedings which demonstrates the Commissioners' approval

of the rezoning is consistent with principles of Montana law.

## A. The Commissioners' Decision to Approve the Rezoning is Supported by the Record and Is Not Spot Zoning Under the Facts Unique to the Request.

In *Little v. Board of County Commissioners of Flathead County* (1981), 193 Mont. 334, 631 P.2d 1282, the Montana Supreme Court adopted a three-part test for illegal spot zoning: 1. whether the requested use is significantly different from the prevailing use in the area; 2. whether the area in which the requested use is to apply is small, although not solely in physical size, an important factor being how many separate landowners benefit from the zone classification; and 3. whether the rezoning is more in the nature of special legislation designed to benefit one or a few landowners at the expense of surrounding landowners or the general public.

Plains Grains repeatedly argues the Highwood Generating Station would be significantly different than the agricultural uses immediately adjacent to the site, but its arguments do not fully consider the appropriate standard for the first prong of the test. The Court is not limited to examining the particular existing lands uses adjacent to the proposed rezoning area. Rather, the Court may consider the land uses allowed under the current zoning, regardless whether they exist, when evaluating whether the requested use differs significantly from the prevailing use in the area. *North 93 Neighbors*, ¶ 67 (citing *Greater Yellowstone Coalition, Inc.*.

*v. Bd. of Co. Commrs.*, 2001 MT 99, ¶ 23, 305 Mont. 232, 25 P.3d 168). Contrary to Plains Grains' arguments, the district court did not consider the rezoning case "in the context of a non-applicable special use regulation." Appellants' Br. 18. Rather, consistent with Montana case law, the district court examined the uses allowed as a matter of right and under a special use permit in Cascade County's A-2 Agricultural district as part of its analysis of the first prong in the *Little* test.

The second and third elements of the test are analyzed together because the number of separate landowners affected by the rezoning directly relates to whether the zoning constitutes special legislation designed to benefit only one person. *North 93 Neighbors*, ¶ 68 (citing *Boland v. City of Great Falls* (1996), 275 Mont. 128, 134, 910 P.2d 890, 894). Rezoning for property owned by one person does not automatically equate to spot zoning. The Court must also consider whether the rezoning occurred at the expense of surrounding landowners or the general public and whether the requested use accords with the comprehensive plan. *North 93 Neighbors*, ¶ 68 (citing *Greater Yellowstone Coalition*, ¶ 21). In *North 93 Neighbors*, the rezoning was not illegal spot zoning where the rezoned property was owned by one person because the proposed rezoning was consistent with the growth policy, benefited the public generally and provided for uses consistent with uses allowed on other properties in the area. *North 93 Neighbors*, ¶¶ 67, 70.

The Urquharts' application addressed the issue of spot zoning and explained why the applicants believed the rezoning request was not illegal spot zoning. Notice at R. 010094-010098. The acreage included in the rezoning application is 668.394 acres, larger than the area in *North 93 Neighbors* by nearly 200 acres which the Court determined was not spot zoning. Notice at R. 010063; *North 93 Neighbors*, ¶¶ 11, 14. While the immediately surrounding property is used for commercial farming operations and is within the Agricultural (A-2) zoning district, the A-2 zoning district allows thirteen land uses as a matter of right, twelve of which are not agricultural in nature. An additional thirty land uses are allowed upon obtaining a special use permit from the County's Board of Adjustment. Included in these special use permit land uses are electrical generation facilities.

Plains Grains argues the County's and the district court's determination that electrical generation facilities like the Highwood Generating Station are permitted special uses in the A-2 zoning district is erroneous because only wind-related electrical generation facilities are permitted. Their argument is predicated upon the County's use of a "/" between "Commercial Wind Farms/Electrical Generation Facilities" in the County's list of special permit uses in § 7.2.3 of the CCZR. Apparently, Plains Grains believes the "/" denotes that the two items are one in the same. Yet, this argument violates the principle of statutory construction requiring

the court to give meaning to each provision of a regulation and avoid an interpretation which renders part of it mere surplusage. *See Milltown Addition Homeowner's Assn. v. Geery*, 2000 MT 341, ¶ 15, 303 Mont. 195, 15 P.3d 458.

In order to give both provisions effect, it is proper to recognize that a Commercial Wind Farm and Electrical Generation Facilities have something in common - the generation of electrical energy - but are not limited solely to wind as the form of the electrical generation. After all, there are five hydroelectric dams, one coal-fired electrical generation plant, and a commercial wind farm within a few miles of the Urquharts' property. Great Falls is not called the "Electric City" on a whim. Thus, the district court correctly concluded that the Highwood Generating Station is one of the thirty types of non-agricultural land uses allowed in the A-2 Agricultural zoning district with a special use permit. The Highwood Generating Station and the rezoning to I-2 are not significantly different than allowable uses on the original zoning because of the condition the Commissioners adopted limiting the land uses in the area rezoned to the Highwood Generating Station.

The County's Staff Report, citing to the Federal Environmental Impact Statement, noted that the Highwood Generating Station has unusual site requirements which had undergone a statewide analysis for preferred alternatives.

The rezoning site was chosen due to its unique combination of factors which made the site the most viable location including access to water and wastewater facilities, electrical transmission lines, rail transportation and a relative lack of environmental and other impacts. The Staff Report also noted that the County did not have enough land zoned for heavy industrial uses to accommodate the Highwood Generating Station facility and concluded that the rezoning had been made with reasonable consideration to the proposed district's peculiar suitability for particular uses. Notice at R. 010458. The rezoning proposal for this particular site did not occur in a vacuum. Rather, it was the culmination of a multi-year process and thorough environmental review by federal, state and county agencies.

While the rezoning directly benefits the Urquharts as the owners of the property, like the rezoning in *North 93 Neighbors* consisting of a single landowner, the rezoning benefits the broader community by providing for a land use consistent with the already permitted special uses in the A-2 Agricultural zoning. The Highwood Generating Station is owned by a collection of electrical cooperatives and provides power to more than 50,000 customers in Montana. A much smaller community benefit has already been sanctioned by this Court as an appropriate action and not spot zoning. *See Boland*, 910 P.2d 890 (rezoning of four square block area provided positive economic benefit to the community as a whole, not

just the landowner).

The rezoning does not constitute illegal spot zoning because the area is large, the allowable uses are not significantly different from the uses allowed in the original zoning designation and the benefits of the rezoning extend beyond a single landowner.

### B. The Commissioners' Adoption of One Condition to the Rezoning and Ten Conditions to the Location Conformance Permit Ensured Compliance With the Twelve Statutory Criteria for Zoning Actions.

The express purpose of zoning regulations is to promote the public health, safety and general welfare. Mont. Code Ann. § 76-2-201 (2007). In order to ensure the proposed rezoning properly addressed the public health, safety and general welfare to the extent possible, the Commissioner imposed eleven conditions, one to the rezoning itself and ten to the location conformance permit. Doing so was well within the Commissioners' inherent powers under the zoning enabling act.

Plains Grains improperly and unfairly characterizes the Commissioners' adoption of conditions to the Urquharts' rezoning application as an eleventh-hour procedure to undermine the right of public participation. Appellants' Br. 41. Plains Grains argues SME's proposed conditions "came as a surprise to the public and did not afford them an opportunity to reasonably respond to the proposed

conditional rezoning." Appellants' Br. 41. Yet, the district court easily dispelled these claims simply by reviewing the record.

After Urquharts submitted their application and well before any of the public hearings, the Cascade County Planning Department issued its Staff Report. This eighteen-page Report thoroughly reviewed the proposed rezoning in accordance with the CCZR, state statutes and the twelve statutory criteria commonly known as the "*Lowe*" test. The district court correctly noted that "[e]ach and every matter raised in [SME's] letter was a direct response to matters articulated in the Staff Report and the Agenda Action Report." Appellants' Br., Tab A at 18:10-12. The district court went on to note that undisputed testimony from the County's Planning Director and Deputy Clerk and Recorder established not only that the "conditions" deemed necessary by Planning Staff were in the original Staff Report, but the Report was on file at the Clerk and Recorder's Office for review by all interested persons. Appellants' Br., Tab A at 19.

As a commission form of local government, Cascade County is entitled to the following powers provided by article XI, section 4 of the Montana Constitution:

> **Section 4. General powers.** (1) A local government unit without self-government powers has the following general powers:
>
> . . .

> (b) A county has legislative, administrative, and other powers provided or implied by law.
>
> . . . .
>
> (2) The powers of incorporated cities and towns and counties shall be liberally construed.

Express powers are those specifically granted by law and implied powers are those "necessary for the execution of the powers expressly granted." 47 Mont. Atty. Gen. Op. 18:2 (1998) (quoting *Billings Firefighters Loc. 521 v. City of Billings* (1985), 214 Mont. 481, 483, 694 P.2d 1335, 1336). The liberal construction of implied powers requires only that there be some constitutional or statutory basis for their existence. 47 Mont. Atty. Gen. Op. 18:2.

The Commissioners' power to adopt conditions as part of the approval of a rezoning application is an important implicit power necessary for the proper execution of their authority to approve rezoning requests. Adopting conditions is a proper method to ensure that a rezoning, particularly as controversial as Urquharts' request, can be accomplished in a way that mitigates legitimate concerns raised by the Planning Staff and members of the public. *Citizen Advocs. for a Livable Missoula v. City Council of City of Missoula*, 2006 MT 47, ¶ 29, 331 Mont. 269, 130 P.3d 1259.

This Court has sanctioned the use of conditions in rezoning actions. In *Boland*, the City of Great Falls adopted "necessary restrictions" on the rezoning to

help ensure compatibility of the development project with the surrounding neighborhood. *Boland*, 910 P.2d at 893. *Citizen Advocates for a Livable Missoula* involved significant use of conditions to ensure a rezoning request would meet the City Council's favor. There, the Court upheld the City Council's decision to reject the Planning Board's recommendation for unconditional approval of the rezoning request and, instead, adopt conditions to limit the impacts of the proposed rezoning and bring the proposal into compliance with the City's Growth Policy. *Citizen Advocs.*, ¶¶ 11-12, 29. The seventeen conditions were drafted by the City's planning staff in response to many of the concerns expressed by the public including the size and design of the proposed facility, the lack of mixed-use and residential character of the initial proposal and the traffic and pedestrian problems generated by the initial proposal. *Citizen Advocs.*, ¶ 12.

In this case, the Planning Staff's recommended conditions address a number of issues raised by Staff and members of the public. The conditions addressed traffic, noise, dust, glare, and limitations on industrial uses other than the proposed Highwood Generating Station, to name a few. Plains Grains does not complain about the specific conditions themselves, but rather challenges the legality of enacting conditions as a permissible practice. Plains Grains cites Connecticut and Illinois case law for the proposition that enacting conditions on rezoning is

improper while simultaneously pointing to the City of Whitefish, Montana, as the correct way to create a system for evaluating conditions. Appellants' Br. 29. The City of Whitefish's process is correct, they argue, because the City of Whitefish passed an ordinance which includes procedures and standards for imposing conditions. Conversely, they argue Cascade County cannot impose conditions because its ordinance is silent on the issue and contains no procedures or criteria.

Plains Grains is incorrect when it claims no criteria exist to guide Cascade County's imposition of conditions on the Urquharts' rezoning request. In fact, there are twelve:

> **76-2-203. Criteria and guidelines for zoning regulations.** (1) Zoning regulations must be:
>
> (a) made in accordance with the growth policy or a master plan, as provided for in 76-2-201(2); and
>
> (b) designed to:
>
> (i) lessen congestion in the streets;
>
> (ii) secure safety from fire, panic, and other dangers;
>
> (iii) promote public health and general welfare;
>
> (iv) provide adequate light and air;
>
> (v) prevent the overcrowding of land;
>
> (vi) avoid undue concentration of population; and
>
> (vii) facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.
>
> (2) Zoning regulations must be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the jurisdictional area.
>
> (3) Zoning regulations must, as nearly as possible, be made compatible with the zoning ordinances of the municipality within

the jurisdictional area.

Mont. Code Ann. § 76-2-203 (2007). These "*Lowe*" factors further implement the overreaching purpose of zoning to promote public health, safety and general welfare. Mont. Code Ann. § 76-2-201(1) (2007).

The Commissioners' use of conditions to mitigate identified impacts and to bring the rezoning proposal into compliance with the County's Growth Policy while addressing issues related to public health, safety and welfare was a proper exercise of their implicit powers to rezone property and consistent with the twelve statutory criteria.

### C. The Commissioners Provided All Interested Persons Multiple Opportunities to Participate in the Process, Exceeding Statutory and Constitutional Requirements.

The procedural requirements for public notice and participation in a zoning or rezoning request are set out in the zoning enabling act and mirrored in Section 14 of the CCZR:

> **76-2-205. Procedure for adoption of regulations and boundaries.** The board of county commissioners shall observe the following procedures in the establishment or revision of boundaries for zoning districts and in the adoption or amendment of zoning regulations:
>
> (1) Notice of a public hearing on the proposed zoning district boundaries and of regulations for the zoning district must be published once a week for 2 weeks in a newspaper of general circulation within the county. The notice must state:

(a) the boundaries of the proposed district;

(b) the general character of the proposed zoning regulations;

(c) the time and place of the public hearing;

(d) that the proposed zoning regulations are on file for public inspection at the office of the county clerk and recorder.

(2) At the public hearing, the board of county commissioners shall give the public an opportunity to be heard regarding the proposed zoning district and regulations.

(3) After the public hearing, the board of county commissioners shall review the proposals of the planning board and shall make any revisions or amendments that it determines to be proper.

(4) The board of county commissioners may pass a resolution of intention to create a zoning district and to adopt zoning regulations for the district.

(5) The board of county commissioners shall publish notice of passage of the resolution of intention once a week for 2 weeks in a newspaper of general circulation within the county. The notice must state:

(a) the boundaries of the proposed district;

(b) the general character of the proposed zoning regulations;

(c) that the proposed zoning regulations are on file for public inspection at the office of the county clerk and recorder;

(d) that for 30 days after first publication of this notice, the board of county commissioners will receive written protests to the creation of the zoning district or to the zoning regulations from persons owning real property within the district whose names appear on the last-completed assessment roll of the county.

(6) Within 30 days after the expiration of the protest period, the board of county commissioners may in its discretion adopt the resolution creating the zoning district or establishing the zoning regulations for the district. However, if 40% of the freeholders within the district whose names appear on the last-completed assessment roll or if freeholders representing 50% of the titled property ownership whose property is taxed for agricultural purposes under 15-7-202 or whose property is taxed as forest land under Title 15, chapter 44, part 1, have protested

> the establishment of the district or adoption of the regulations, the board of county commissioners may not adopt the resolution and a further zoning resolution may not be proposed for the district for a period of 1 year.

Mont. Code Ann. § 76-2-205 (2007). These procedures provide for opportunities for public participation as required by article II, sections 8 and 9 of the Montana Constitution as implemented through the Montana Public Participation Act. Montana Code Annotated § 2-3-111(1) requires the following:

> Procedures for assisting public participation must include a method of affording interested persons reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public.

The provisions of § 76-2-205 comply with these provisions by requiring local governments to give notice of a proposed rezoning and hold a public hearing to "give the public an opportunity to be heard regarding the proposed zoning district and regulations." Mont. Code Ann. § 76-2-205(2) (2007).

The County held two public hearings on the rezoning request, the first before the Planning Board lasting nearly eight hours and the second before the County Commissioners lasting eleven and one-half hours. Prior to the hearings, the County provided multiple public notices published in the *Great Falls Tribune* and encouraged interested persons to submit comments in writing prior to the hearings. More than 1,900 citizens directly participated in

one form or another. To say that participation was high, active and very involved is a significant understatement. Despite the length of the public hearings and the contentious nature of the issue, the proceedings were civil and respectful. During their eleven and one-half hour hearing, the Commissioners altered the proceedings midstream to ensure proponents and opponents would have an equal opportunity to present testimony. All application materials, staff reports and many other documents were posted to the County's website, as well as filed at the Clerk and Recorder's Office. County Planning Staff maintained a complete record of everything it received at the County Planning Department and made it available to the public.

Despite the County's efforts to ensure multiple opportunities for public participation and access to all documents through multiple formats and locations, Plains Grains claims the County violated its public participation rights. First, Plains Grains claims the proposed zoning regulations were not on file for public inspection. Second, Plains Grains claims it was not permitted to review public hearing testimony prior to it being presented to the Commissioners at the public hearing. These claims are easily dismissed.

### 1. The Proposed Zoning Regulations Were on File at the County Clerk and Recorder's Office and the County Provided Exceptional Access to All Materials for Public Review and Inspection Throughout the Process.

The proposed zoning regulations are not difficult to decipher. As plainly stated in their rezoning application, the Urquharts asked the County Commissioners to rezone their property from A-2 Agricultural zoning to I-2 Industrial zoning for the purpose of constructing and operating the Highwood Generating Station. The application was on file at the County Clerk and Recorder's Office. This is an undisputed fact. Only by mischaracterizing SME's January 8, 2008, letter addressing the proposed conditions on the zoning regulations does Plains Grains craft an allegation that the County failed to place the proposed zoning regulations on file at the Clerk and Recorder's Office.

Section 76-2-205(1)(d) requires the County's published notice of the proposed rezoning to include notification "that the proposed zoning regulations are on file for public inspection at the office of the county clerk and recorder." This notice is published prior to the public hearing and alerts interested parties to the proposed boundaries and nature of the zoning or rezoning action.

Plains Grains does not question whether the application was on file at the Clerk and Recorder's Office. This is an established and undisputed fact. Rather, Plains Grains argues that a letter dated January 8, 2008, from SME to the Planning

Director indicating acceptance of eleven conditions "are clearly 'proposed zoning regulations' related to the rezoning of the 668 acres . . . ." Appellants' Br. 36. Clearly they are not.

The district court included the entire text of the letter in its Order. *See* Appellants' Br., Tab A at 16-17. In the letter, SME notes its purpose is to respond "to issues which have arisen in connection with the rezoning application." Appellants' Br., Tab A at 16. As the district court noted, only the first of the eleven enumerated statements addresses the rezoning. It notes that "SME agrees, as a condition of rezoning to heavy industrial use, that such use shall be solely for purposes of an electrical power plant." Appellants' Br., Tab A at 16. The remaining ten enumerated items address conditions SME agrees may be attached to a location conformance permit which is issued prior to construction following a successful rezoning.

Other than characterizing SME's letter as "proposed zoning regulations" Plains Grains fails to explain how the County failed to publish notice of the regulations which were proposed by the applicant at the time it submitted its application. How on earth could the Commissioners publish notice of something prior to having any knowledge of it? Apparently, Plains Grains would have this Court believe that any changes to the originally proposed zoning regulations

instantly invalidate proper public notice which provided accurate and complete knowledge of the proposed zoning regulations as they were proposed when the application was submitted.

Plains Grains' argument is frivolous and also plainly contradicted by state statutes. Zoning regulations are not required to remain static throughout the review process from the moment of application to the moment of final adoption. Section 76-2-204 requires the "planning board to recommend boundaries and appropriate regulations for the various zoning districts" and to "make written reports of their recommendations to the board of county commissioners" which "shall be advisory only." After the Commissioners hold a public hearing they "shall review the proposals of the planning board and shall make any revisions or amendments that [they] determin[e] to be proper." Mont. Code Ann. § 76-2-205(3) (2007). Plains Grains incorrectly argues that any such revisions or amendment the Commissioners might make to the regulations and boundaries would be "proposed zoning regulations" which had not been part of the published notice and, therefore, invalid. Rather, it is clearly an anticipated and statutorily authorized part of the process that things change based on input from the planning board, interested citizens and, certainly, the applicant.

The purpose of the notice requirements in § 76-2-205 is obvious. The notice

alerts any interested persons to the proposed zoning action allowing them to take part in the process should they desire. By statute, this notice is published prior to the public hearing and any consideration of the zoning proposal by the Commissioners. The Commissioners are clearly authorized to make changes to the proposal identified in the notice and the final result may or may not reflect the original application. It is undisputed that the Commissioners provided proper public notice of the proposed zoning regulation. Arguably, the Commissioners approved exactly what was originally proposed by the applicants because it was clear from the start that the proposed use of the property was solely for the Highwood Generating Station. Conversely, that the Commissioners arguably made a slight change to the original proposal (limiting the land use in the new I-2 zoning to solely the Highwood Generating Station) has no bearing on whether the Commissioners provided proper notice of the original proposal. Plains Grains' argument is without merit.

### 2. SME's Choice to Provide Supplemental Information to the Commissioners At a Public Hearing Does Not Violate Plains Grains' Right of Participation.

During the multi-stage process to consider the Urquharts' rezoning request, numerous persons and interested parties submitted thousands of pages of written comments and delivered hours or oral testimony. The written portion of the record

of proceedings exceeds 12,000 pages and fills twelve volumes of three-ring binders. Some of the written information was presented to the County prior to the Planning Board and County Commissioners' hearings. Much of it was presented at the hearings. Despite also presenting voluminous written materials to the Planning Board and Commissioners at the public hearings, Plains Grains argues that SME's choice to present supplemental written materials at the hearings violates its rights of participation. Its argument is predicated on an improper mixing of legislative and administrative case law and an unrealistic, unworkable notion of the public hearing process.

Plains Grains argues *Bryan v. Yellowstone County Elementary School District. No. 2,* 2002 MT 264, 312 Mont. 257, 60 P.3d 381, supports its argument that the Commissioners failed to provide the public with a proper opportunity to participate in the rezoning proceedings. Its argument is predicated on the idea that it did not have an opportunity to review and comment upon SME's January 8, 2008, letter and other written materials SME submitted to the Commissioners at the Commissioners' public hearing. Yet, there is a critical difference between the situation in *Bryan* and what occurred in this case and demonstrates Plains Grains' argument fails.

In *Bryan*, the plaintiffs successfully demonstrated a relevant document, a

matrix of pros and cons for closing certain schools, was available days before the school district held a public hearing to consider school closures. *Bryan*, ¶ 38. However, the school district had denied such a document existed. *Bryan*, ¶ 38. The plaintiffs alleged the document contained serious flaws and errors which, had they obtained the document prior to the meeting, would have enabled them to undermine the basis for the school closures. *Bryan*, ¶ 45. The Court held the school district's failure to provide the document caused the plaintiffs to participate with a distorted perspective in violation of their right to know and right to participate. *Bryan*, ¶ 45.

Plains Grains craftily submitted an affidavit from Anne Hedges, which provides an after-the-fact statement approximating the discussion in *Bryan* by claiming Plains Grains would have rebutted and corrected representations made in SME's submissions as demonstrated by another after-the-fact analysis prepared by Plains Grains' consultant, Kate McMahon. Appellants' Br. 37-38. These self-serving statements do nothing to bolster its arguments. In contrast to *Bryan*, during the rezoning action, Plains Grains had the same access to the information the Commissioners did. Unlike *Bryan*, the Commissioners clearly did not have these documents in their possession during the process and did not deny the existence of something they did not even know about. Plains Grains also ignores the fact that

during SME's presentation to the Commissioners, which occurred prior to opening the hearing for general public comments, SME explained each page of the information contained in the binder during a rather lengthy Powerpoint presentation. Plaintiffs' comments addressed many of the issues included in SME's binder and presentation.

Plains Grains next turns to this Court's recent decision in *Citizens for Responsible Development v. Board of County Commissioners of Sanders County*, 2009 MT 182, 351 Mont. 40, 208 P.3d 876, but fails to distinguish between the administrative and statutory requirements in *Citizens* and the legislative process in the subject case. *Citizens* involved a county's administrative process and decision on a subdivision application. *Citizens*, ¶ 4. The Montana Subdivision and Platting Act required the county commission to conduct a baseline determination of whether the subdivision application included the required elements and sufficient information to allow the application review to proceed. *Citizens*, ¶ 17. However, the commissioners failed to conduct the required baseline determination and instead allowed the required information to trickle in during the course of the process in a format that made it difficult to decipher. *Citizens*, ¶¶ 20-24. This failure violated the procedural requirements of the Montana Subdivision and Platting Act resulting in the Court's determination that the commissioners acted

unlawfully. *Citizens*, ¶ 26.

Here, Plains Grains did argue in the district court that the Urquharts' rezoning application failed to meet the County's application requirements by failing to include a letter signed by the landowners requesting the rezoning. This was a curious argument because, as the district court noted, the letter is included in the Urquharts' application. *See* Appellants' Br., Tab A at 23; Notice at R. 010060-010061. Plains Grains presented no other arguments claiming the application to be insufficient to meet the County's requirements.

Though *Citizens* involved the statutory requirements of the Montana Subdivision and Platting Act rather than the Zoning Enabling Act, it does address an analogous issue pertaining to supplemental materials submitted during a review process. In *Citizens*, the Court squarely rejected arguments that no additional materials may be submitted after an application is deemed complete:

> CRD's argument that the initially-submitted [environmental assessment] must contain all information that could be potentially relevant to the governing body's review of the subdivision, and that the applicant cannot supplement the EA by providing additional information during the review process, is not consistent with the MSPA. Section 76-3-604(2)(c), MCA, specifically contemplates that the governing body may request additional information.

*Citizens*, ¶ 16.

In this case, the government, Cascade County, did not request additional

information. SME, which was not the applicant, chose to submit additional information to address many of the issues Plains Grains and others raised during the process, particularly during the Planning Board hearing. One could fairly characterize SME's supplemental materials as rebuttals of earlier written and oral testimony provided by opponents to the Highwood Generating Station. That SME might desire to provide additional information to the Commissioners during a public hearing open to all who wished to provide information should hardly come as a surprise to Plains Grains or anyone else. The rezoning request involved a legislative decision which confers a significant amount of deference on the Commissioners in contrast to the highly statutory administrative process for considering subdivisions.

The record reveals that the County provided a reasonable opportunity for the public to participate in the proceedings and that the public was fairly apprised of the proposed rezoning. In fact, the first hearing before the Planning Board was not even required. The statutory process only requires one hearing and that hearing must occur before the County Commissioners. *See* Mont. Code Ann. § 76-2-205. The County chose to adopt a process that also includes a hearing before the Planning Board in order to increase the amount of public participation and exposure to the relevant issues. The application materials were available for

review at multiple locations and on the County's website. Parties on all sides of the relevant issue were given two opportunities to appear at public hearings and months of time to prepare and submit written comments. The fact that parties on *both* sides of an issue submitted additional comments and information at the final public hearing does not render that hearing a violation of the public's right to know or participate in the *legislative* process of considering a rezoning. Accepting Plains Grains' arguments would radically alter the public hearing process employed by local governments across Montana and, indeed, the Montana legislature. It would allow for a never-ending series of complaints of unfairness simply because the opposing side chose to *participate* in a hearing rather than stand quietly on the sidelines.

The Urquharts' application to rezone their property was complete and provided sufficient information for the County to conduct its review. County Planning Staff prepared a comprehensive staff report evaluating the application against the twelve required criteria. In the nineteen hours of hearings and months of consideration that followed, more than 1,900 citizens participated, some cheering the proposal and some panning it. Proponents and opponents alike submitted reams of written comments and materials and presented hours of oral testimony in hopes of convincing the Commissioners of the merits of their

position. The Commissioners accepted all of it, took it under advisement, reviewed it and rendered a decision that is supported by the record. There was no error and Plains Grains' claims fail.

## VII. CONCLUSION

The Commissioners' decision to approve the rezoning request was based on a thorough examination of the record before them following a public process which complied with all state and local requirements. The record is not "so lacking in fact and foundation" as to make judicial review impossible and permit a reversal of the Commissioners' discretion. Rather, the record demonstrates the admirable – and legally compliant – effort the Commissioners undertook to consider a difficult and controversial issue. During the review process, County Planning staff and members of the public identified potential impacts from the proposed rezoning. The Commissioners, consistent with their inherent powers under the zoning enabling authority, adopted conditions designed to bring the rezoning into acceptable compliance with the County's Growth Policy and better provide for protecting the public health, safety and welfare. Ultimately, the Commissioners provided multiple opportunities for all interested parties to fairly participate in the legislative process to consider and approve the Urquharts' rezoning request. Consistent with the district court's examination of the parties' arguments, Plains Grains' claims should be rejected.

DATED this 11th day of September, 2009.

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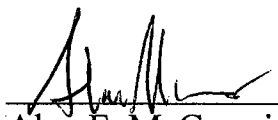
## CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(d), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2007, is not more than 10,000 words, excluding Certificate of Service and Certificate of Compliance.

DATED this 11th day of September, 2009.



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## CERTIFICATE OF SERVICE

I hereby certify that I served true and accurate copies of the foregoing *Appellee Board of County Commissioners' Brief* by depositing said copies into the U.S. mail, postage prepaid, addressed to the following:

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